

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

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| In the matter of the amendment of ARM ) | NOTICE OF AMENDMENT |
| 17.30.660 pertaining to nutrient )      |                     |
| standards variances )                   | (WATER QUALITY)     |

TO: All Concerned Persons

1. On September 6, 2019, the Department of Environmental Quality published MAR Notice No. 17-408, pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1443 of the 2019 Montana Administrative Register, Issue No. 17.

2. The department has amended ARM 17.30.660 as proposed but with the following changes, stricken matter interlined, new matter underlined:

17.30.660 NUTRIENT STANDARDS VARIANCES (1) through (8) remain as proposed.

(9) If a court of competent jurisdiction determines that the United States Environmental Protection Agency's October 31, 2017 approval of the general variance is valid and lawful, then the incorporations by reference of the November 2019 edition of Department Circular DEQ-12B contained in this rule shall be void, and the May 2018 edition of Department Circular DEQ-12B shall contain the applicable general variance. If such contingency occurs, all references to the November 2019 edition of Department Circular DEQ-12B contained in this rule shall be stricken and shall be considered as replaced with the May 2018 edition.

AUTH: ~~75-5-201, 75-5-301~~ 75-5-313, MCA

IMP: 75-5-313, MCA

3. The department has thoroughly considered the comments received. A summary of the comments received and the department's responses are as follows:

COMMENT NO. 1: The proposed revisions seem in some cases to modify things outside of what Judge Morris required in his ruling. Is MDEQ looking to change other aspects of this circular outside of the judge's ruling? If so, why?

RESPONSE: The department disagrees that the proposed revisions to the rule go outside the rulings of the federal district court. The Court Order requires the department to clarify the following two timelines: (1) the time to meet the treatment requirements in Table 12B-1 of Department Circular DEQ-12B, and (2) the time to meet the base numeric nutrient standards in Department Circular DEQ-12A. In addition to specific timeframes, the department identified steps for permittees to achieve the Table 12B-1 treatment requirements (e.g., steps towards meeting highest attainable condition (HAC), pollutant minimization programs (PMPs)). No changes have been made to Department Circular DEQ-12B in response to this comment.

COMMENT NO. 2: Please describe how Section 2.3.1 is required under Judge Morris' ruling. The current Department Circular DEQ-12B language already provides mechanisms outlining continual progress to attain the basic numeric nutrient standards. These extra additions to the Department Circular and guidance manual place additional financial burdens on permittees and simply are not necessary.

RESPONSE: The department does not believe the amendment to Section 2.3.1 adds additional financial burdens on permittees, and agrees with the commenter that the current version of Department Circular DEQ-12B does provide mechanisms for continual progress towards attaining basic numeric nutrient standards in Department Circular DEQ-12A. Section 2.3.1 is to clarify how specific components of the general variance (future updates to the general variance treatment requirements, and PMPs) will ensure progress towards achieving the base numeric nutrient standards. Section 2.3.1 requires permittees to make all reasonable progress toward attainment of the base numeric nutrient standards in consideration of the district court's ruling. No changes have been made to Department Circular DEQ-12B in response to this comment.

COMMENT NO. 3: The proposed revisions modify and add substantive language outside of what Judge Morris required in his ruling. Further, we fail to find justification in the MAR notice detailing the proposed language outside of the judge's ruling. We are asking the department to provide justification showing why the proposed language in Department Circular DEQ-12B is reasonable and necessary and why the proposed language is required by the judge's ruling.

RESPONSE: The department disagrees that the proposed revisions to Department Circular DEQ-12B go beyond the ruling of the federal district court. The statement of reasonable necessity for the rule amendment is set forth in the Notice of the Public Hearing on Proposed Amendment, MAR Notice No. 17-408. See 17 Mont. Admin. Register 1443, 1444-1446 (Sept. 6, 2019). See *a/so* responses to Comments No. 1 and 2. No changes have been made to Department Circular DEQ-12B in response to this comment.

COMMENT NO. 4: Phosphorus is the priority nutrient to manage for control of nuisance algal growth in streams that receive wastewater discharge.

RESPONSE: This rulemaking addresses only the specific concerns of the federal district court. The commenter's asserted concern is outside the scope of this rulemaking. No changes have been made to Department Circular DEQ-12B in response to this comment.

COMMENT NO. 5: In Section 2.0 of Department Circular DEQ-12B, page two third paragraph, it states that DEQ will use the 95th percentile of monthly average discharge concentration data to determine if the effluent was (before 7/1/2017) attained or did better than the values in Table 12B-1. We recommend DEQ use the maximum concentration instead.

RESPONSE: This rulemaking is only intended to address the specific concerns of the federal district court. The commenter's suggestion is outside the

scope of this rulemaking. No changes have been made to Department Circular DEQ-12B in response to this comment. See *also* response to Comment No. 54.

COMMENT NO. 6: Department Circular DEQ-12B, Section 2.2.1.1, bullet point paragraph one, sentence two: replace "shall" with "may."

RESPONSE: See response to Comment 49.

COMMENT NO. 7: Department Circular DEQ-12B, Section 2.2.1.2, paragraph one, sentence three: replace "shall" with "may."

RESPONSE: See response to Comment 49.

COMMENT NO. 8: Department Circular DEQ-12B, Section 2.0, paragraph one, sentence eight: revise the sentence to say, "A compliance schedule to meet the treatment requirements shown in Table 12B-1 may also be granted on a case-by-case basis, provided that permittees are not immediately able to achieve the HAC. The compliance schedule shall take into account the loading of the facility and if the average facility influent flow rates are not at or near design flow rates."

RESPONSE: Loading of a facility and average influent flow rates are matters outside the scope of this rulemaking. This rulemaking is only intended to address the specific concerns of the federal district court. No changes have been made to Department Circular DEQ-12B in response to this comment.

COMMENT NO. 9: Department Circular DEQ-12B, Section 2.3, paragraph four, sentence three: replace "may" with "will."

RESPONSE: The purpose of the nutrient variances is to provide time for nitrogen and phosphorus removal technologies to improve and become less costly and for nonpoint sources of nitrogen and phosphorus pollution to be better addressed. Because a permanent downgrading of uses precludes the possibility of achieving the base numeric nutrient standards, the department must ensure it maintains flexibility to evaluate potential alternatives. No changes have been made to Department Circular DEQ-12B in response to this comment. See *also* response to Comment No. 20.

COMMENT NO. 10: The MAR notice states: "The Court did not vacate EPA's approval of the department's findings concerning widespread economic and social impacts, nor did it vacate approval of the treatment requirements found in Table 12B-1 of Department Circular DEQ-12B (what the court refers to as the "Current Variance Standard" or "highest attainable condition")." We agree with the department's conclusion and feel it is appropriate to include in DEQ-12B a direct tie to the variance numbers in Table 12B-1 to the May 2018 edition. Without a citation to the year of the document, which the court had no concern regarding Table 12B-1, the triennial review process may change the HAC numbers in Table 12B-1. If the HAC is lowered during a triennial review, additional facilities will be impacted and the dates for compliance should be extended to allow time for planning and capital improvements. We recommend adding language to clearly state all modifications in Table-12B-1 will include a review and reconsideration of the time necessary to spend enough money to comply with HAC Table 12B-1.

RESPONSE: The department agrees with the comment that there is a direct tie with the variance numbers in Table 12B-1 May 2018 edition (identical to the values in the November 2019 edition). Through a triennial review process, should those values be revised in the future, the department will review, and reconsider the time necessary to meet the revised values. No changes have been made to Department Circular DEQ-12B in response to this comment.

COMMENT NO. 11: The proposed revision in Department Circular 12B November 2019 edition at Section 2.0 states that a compliance schedule may be granted by the department, provided that permittees are not immediately able to achieve the HAC. The phrase "immediately able to achieve the HAC" needs to be further defined and clarified. A definition should be provided that ties achievement of the HAC to the operation of a POTW with a DEQ-approved design HAC nutrient effluent performance at its DEQ-approved design capacity.

RESPONSE: The department disagrees with the comment. The plain meaning of the words "immediately able to achieve the HAC" is sufficiently clear. The referenced sentence affords the department discretion to grant a compliance schedule on a case-by-case basis if a permittee is not immediately able to achieve the HAC. No changes have been made to Department Circular DEQ-12B in response to this comment.

COMMENT NO. 12: DEQ must consider a process for dealing with unforeseen delays in capital project delivery to ensure a permittee is protected from non-compliance situations caused by events that are out of the permittee's control.

RESPONSE: The department has taken into account unforeseen delays in capital projects in establishing the 2027 deadline for meeting HAC. See HAC Compliance Schedule Memo (Aug. 13, 2019). The department will also consider potential delays in capital project delivery in establishing future compliance schedules to ensure they are achievable. This consideration will occur on a case-by-case basis during the MPDES permit process.

COMMENT NO. 13: The proposed addition to Department Circular DEQ-12B (November 2019 edition) at Section 2.1 states that [All] facilities in the  $\geq 1$ MGD and  $< 1$ MGD discharge categories must meet the treatment requirements in Table 12B-1 as soon as possible, but in no case later than July 1, 2027. (emphasis added). The phrase "as soon as possible" is highly subjective, yet remains undefined in the rule.

RESPONSE: In its March 2019 Order (CV-16-52-GF-BMM), the federal court ordered all parties to confer in good faith on remedies "that include a timeline to achieve *prompt* compliance with the Current Variance Standard" (emphasis added). In its July 2019 Order (CV-16-GF-BMM), the court also recognized that dischargers currently stand at different levels of attainment of the treatment requirements in Table 12B-1 of Department Circular DEQ-12B. The highest attainable condition is the temporarily applicable water quality standard. If a permittee is not immediately able to achieve the HAC, a compliance schedule may be granted. Any compliance schedule must require compliance as soon as possible. See ARM 17.30.1350. The department does not believe a definition for the term "as soon as possible" is needed. No changes have been made to Department Circular DEQ-12B in

response to this comment.

COMMENT NO. 14: We request changing "Should substantial and widespread economic and social impacts continue to be unavoidable at the end of the variance term the department **may consider revising** to **will revise** the aquatic life, recreation or both designated uses to reflect achievable uses and criteria where eventual attainment is very unlikely."

RESPONSE: See responses to Comments No. 9 and 20.

COMMENT NO. 15: In Section 2.0, there is reference to the DEQ Water Quality Standards webpage for a list of permittees likely to need a general variance. Presently there is no list there that we can find. The commenter suggests that DEQ put the current list in Department Circular DEQ-12B and then reference the webpage (giving a specific URL address) for updates to the list.

RESPONSE: The department is presently considering how to best document which facilities are eligible for a general variance under EPA's October 31, 2017 Action Letter (8WP-C). The department's website will be updated with the appropriate information once that determination is made.

COMMENT NO. 16: Throughout the draft rule amendment there are several references to "subchapter 13." References should instead give full reference to Title 17, Chapter 30, Subchapter 13, ARM.

RESPONSE: The department identified two locations (Section 2.2.1.1 bullet two, and Section 2.2.1.2, last bullet) where the comment applies. At this time, the commenter's suggestion is outside the scope of this rulemaking. This rulemaking is only intended to address the specific concerns of the federal district court. No changes have been made to Department Circular DEQ-12B in response to this comment. However, the department will consider the recommended wording change during the upcoming triennial review of Department Circular DEQ-12B in 2020.

COMMENT NO. 17: The commenter suggests that the sentence "If the department fails to conduct the triennial review as specified at Section 75-5-313(8), MCA, or if the results of the triennial review are not submitted to EPA within 30 days of the completion of the review, the variance will not be applicable for purposes of the Federal Clean Water Act until such time as the review is completed and submitted to EPA" be deleted.

RESPONSE: This requirement is based upon federal requirements at 40 C.F.R. § 131.14(b)(v). Nevertheless, the commenter's suggestion is outside the scope of this rulemaking. This rulemaking is only intended to address the specific concerns of the federal district court. No changes have been made to Department Circular DEQ-12B in response to this comment.

COMMENT NO. 18: In Guidance, Section 2.2 Pollutant Minimization Program, the first sentence states "A pollutant minimization program (PMP) is defined in Department Circular DEQ-12B as "a structured set of activities to improve processes and pollution controls that will prevent and reduce nutrient loadings." To

match DEQ-12B the word "pollutant" should replace "pollution."

RESPONSE: The department agrees that there is a mismatch in wording between the two documents and will make the recommended change to the Guidance Document.

COMMENT NO. 19: In Guidance, Section 7 References, the reference to Department Circular DEQ-12B should be updated to November 2019.

RESPONSE: The department will update the citation and complete the Guidance Document at the time that the rulemaking is complete.

COMMENT NO. 20: The department is proposing the addition of the following language in New Section 2.3: "Should substantial and widespread economic and social impacts continue to be unavoidable at the end of a variance term, the department may consider revising the aquatic life, recreation, or both designated uses to reflect achievable uses and criteria where eventual attainment is very unlikely." We recommend modifying this sentence to state: "Should substantial and widespread economic and social impacts continue to be unavoidable at the end of a variance term, the department may recommend the Board of Environmental Review to consider revising the aquatic life, recreation, or both designated uses to reflect achievable uses and criteria where eventual attainment is unlikely." The Montana Water Quality Act and the CWA provide clear access to revise uses and associated criteria. Neither the State or Federal act support the additional requirement to wait 20 years. Adding a requirement to wait to the end of the 20-year variance term is an unnecessary length of time for some communities to gain certainty in their permitting decisions. Additionally, adding the word "very" adds an unnecessary level of subjectivity. Finally, we recommended a correction as the department does not have the statutory authority to revise uses or criteria as this responsibility lies with the Board of Environmental Review.

RESPONSE: The department agrees that the Montana Water Quality Act and Federal Clean Water Act allow for changes to beneficial uses of state waters. Montana's Water Quality Act also allows that variances from base numeric nutrient standards be given a twenty-year period to operate (75-5-313, MCA). The purpose of the nutrient variances is to provide time for nitrogen and phosphorus removal technologies to improve and become less costly and for nonpoint sources of nitrogen and phosphorus pollution to be better addressed. A permanent downgrading of uses precludes this possibility, and contradicts the purpose of 75-5-313, MCA. The department is aware that authority to change uses and criteria lies with the board, and would seek board approval for any changes recommended by the department. To provide additional clarity, the department agrees to modify the sentence in Section 2.3 of Amended Department Circular DEQ-12B to the following: "Should substantial and widespread economic and social impacts continue to be unavoidable at the end of the variance term, the department may recommend the Board of Environmental Review consider revising the aquatic life, recreation, or both designated uses to reflect achievable uses and criteria where eventual attainment is unlikely."

COMMENT NO. 21: The 2018 Table 12B-2 provided in rule approximates

timeframes the department anticipated would be necessary to reach the HAC. As proposed in response to the judge's ruling, Table 12B-2 removes the anticipated timeframes. In the absence of timeframes this table is no longer providing value to permittees or the public. Further, if a permittee elects to not proceed in the process as described in rule would there be non-compliance ramifications for not following the rule? We recommend Section 2.1 and Table 12B-2 be removed from the Department Circular and instead be placed into the department's guidance document.

**RESPONSE:** Changes to Section 2.1 of the Department Circular were made in direct response to the Court Order. Table 12B-2 has been simplified to reflect the basic steps a permittee usually undertakes to upgrade and optimize a wastewater facility; these steps closely correspond to those outlined by department engineers in their August 13, 2019 memo (throughout the public comment period, the memo was provided on the department's website alongside other materials related to this rulemaking). The department believes Table 12B-2 continues to provide value in the circular; and the circular makes clear that it is not necessary to proceed through the activities in the order shown in the Table. No changes have been made to Department Circular DEQ-12B in response to this comment.

**COMMENT NO. 22:** The commenter suggests that "currently achieving 12B-1 treatment requirements" be defined as an operating POTW having a DEQ-approved design nutrient effluent performance meeting the 12B-1 requirements at its DEQ-approved design capacity.

**RESPONSE:** The comment discusses requirements which are outside the scope of this rulemaking. This rulemaking is only intended to address the specific concerns of the federal district court. No changes have been made to Department Circular DEQ-12B in response to this comment.

**COMMENT NO. 23:** DEQ is signaling a heavily prescriptive approach to development of a PMP, which is unnecessary and unfounded at present. A permittee should be allowed flexibility to develop and update its PMP to operate within permit limits and not be limited by a prescriptive form for a program that the nutrient workgroup has not reviewed.

**RESPONSE:** The department does not agree that the PMP development process will be heavily prescriptive; it is designed to be flexible. If the department had intended for the requirement to be heavily prescriptive, PMP-related text currently included in the draft guidance document would have been included in the draft circular. The guidance document is not a binding regulatory requirement; rather, it is a useful guide for permittees.

**COMMENT NO. 24:** What is to happen to municipalities that can currently comply with the HAC because their facilities are currently underloaded (i.e., the treatment facility was designed for more connections than are currently being served)? The effluent quality from these facilities may decrease as connections increase. If this is within the original design capacity, these municipalities should be accommodated and eligible for the same long-term compliance tools as other municipalities (compliance schedule, variances).

RESPONSE: This rulemaking is only intended to address the specific concerns of the federal district court and the comment is outside the scope of the rulemaking. Regarding the topic of effluent quality as a function of loading and design capacity, the department understands there are differing engineering opinions as to whether or not a specific wastewater facility will see a deterioration in its effluent quality as it moves closer to design capacity. No changes have been made to Department Circular DEQ-12B in response to this comment.

COMMENT NO. 25: Achievement of the HAC by 2027 is not reasonable. DEQ's correspondence on this matter has focused on just the planning, funding procurement, design, construction, and startup of wastewater treatment infrastructure (see DEQ's August 13, 2019 letter titled "HAC Compliance Schedule"). This is only a portion of the work that will need to be completed for successful achievement of the timeline.

RESPONSE: The department does not agree with the comment. As was detailed in the August 13, 2019 memo prepared by department wastewater engineers, HAC can be accomplished by July 1, 2027 even if a permittee pursues public funding (via grant and loan application) which is available next in 2022. Department engineers included all the necessary steps to meet HAC, including the possibility of an application in 2022, as well as a full year to operate and optimize the facility.

COMMENT NO. 26: Inability to comply with 12B-1 by 2027 will push some dischargers to eliminate surface water discharges in favor of groundwater discharge and/or effluent reuse projects. Has DEQ considered the impact of other dischargers shifting from surface water to groundwater discharge, or reuse, on surface water flows? Is anyone coordinating this issue with Fish, Wildlife and Parks?

RESPONSE: This rulemaking is only intended to address the specific concerns of the federal district court and the comment is outside the scope of the rulemaking. However, the commenter's concern has been discussed on a number of occasions during the five-year period the department consulted with the Nutrient Work Group prior to the 2014 adoption of the nutrient standards and the variance procedures (i.e., circulars DEQ-12A and DEQ-12B). To the department's knowledge, the outcomes expressed in the comment have not occurred.

COMMENT NO. 27: The edits to 12B and 12A will require new drafts of permits, many with compliance schedules; reviews of general and individual variances; review and monitoring of pollutant minimization programs; treatment plant performance evaluations; review of affordability analyses as well as participating in and leading the triennial review process - between now and 2027. Turnaround time of these impact the ability of communities to execute capital improvement and financial plans. Has a budget for additional DEQ staff time and hiring been evaluated?

RESPONSE: This rulemaking only concerns limited portions of Department Circular DEQ-12B. Department Circular DEQ-12A is outside the scope of this rulemaking. The department is cognizant of the court ordered workload; facilities that will be affected by Department Circular DEQ-12B changes were discussed in



the rule amendment notice. The department does not anticipate additional staff will be needed to address an increase in workload.

COMMENT NO. 28: Revised Department Circular DEQ-12B must provide a transparent accountability framework capable of ensuring existing dischargers covered by a general nutrient variance attain the HAC, which represents the Current Variance Standard, as soon as possible.

RESPONSE: The department believes a transparent and accountable framework is set forth in the revised Department Circular DEQ-12B. Department Circular DEQ-12A establishes the water quality standards, and Department Circular DEQ-12B establishes the HAC treatment requirements and timelines to meet HAC as soon as possible, as well as a triennially occurring process to review the HAC. Implementation of the standards and variances (including documentation of reasonable potential analysis, inclusion of variances where necessary, etc.) is documented in the MPDES permit process on a case-by-case basis. Any decision to grant a variance must be reflected in the MPDES permit and supporting Fact Sheet that is made available for public comment.

COMMENT NO. 29: Revised Department Circular DEQ-12B must provide a timeline of actions and activities that require dischargers to make meaningful progress towards attainment of base water quality standards, within the timeframe of the variance.

RESPONSE: The department agrees. The draft circular provides both timelines and potential steps to achieve HAC and the base numeric nutrient standards, and organizes these elements according to discharge group ( $\geq 1$  million gallons per day,  $< 1$  million gallons per day, lagoons). By providing a timeline and identifying potential steps for achieving the HAC, the specific concerns of the federal district court are being met.

COMMENT NO. 30: Revised Department Circular DEQ-12B fails to lay out a regulatory path capable of ensuring dischargers continue to ratchet down their pollution controls and improve water quality *above and beyond* the HAC/Current Variance Standard. Therefore, it fails to provide a "feasible" path towards ultimately attaining base WQS criteria.

RESPONSE: The department does not agree. The department must review the HAC every three years and update the HAC requirements if a new pollutant control technology for treating nitrogen and phosphorus has become feasible (i.e., the cost of such pollutant control technology would not cause substantial and widespread social and economic impacts). For those meeting current HAC, permittees must implement a pollutant minimization program as terms and conditions of their permit, the details of which vary by facility. The PMP process, including necessary PMP updates, will assure water quality improvements above and beyond HAC. This combined process creates steps that will be taken to ensure permittees make progress towards the numeric nutrient criteria.

COMMENT NO. 31: DEQ must reconsider its proposed addition to Section 2.0 of Department Circular DEQ-12B and provide further detail. DEQ must make the

following changes (text recommended to be deleted shown as strikethrough, new additions as underline). [Note: Text that is shown as both strikethrough and underline is new text appearing in proposed Department Circular DEQ-12B that the commenter wishes to delete.]

A person may apply for a general variance for either total phosphorus (TP) or total nitrogen (TN), or both. ~~§ 75-5-313(8), MCA, authorizes the general variance for a period not to exceed 20 years.~~ Through the permitting process and the specific details of each facility, the time required must be as short as possible to meet the highest attainable condition (HAC). ~~A compliance schedule to meet the treatment requirements shown in Table 12B-1 may also be granted on a case-by-case basis, provided that permittees are not immediately able to achieve the HAC. If the department determines a compliance schedule is necessary, it will be granted upon permit renewal.~~ Any permittee that is not presently attaining the HAC at its facilities shall submit a request to the department for a compliance plan within 30 days of this rule's effective date. DEQ will work with the permittee to develop an appropriate compliance plan leading to attainment of HAC and approve the compliance plan within 60 days of submission of the request required herein. The compliance plan shall set forth specific actions, approvals, timetables and deadlines for securing authority and funding necessary to implementing applicable wastewater treatment optimization and/or structural improvements and to achieving the HAC on or before January 1, 2023.

**RESPONSE:** The department disagrees with the comment. The department stated in the rule amendment notice it would incorporate Table 12B-1 treatment requirements or compliance schedules into permits for all permittees not meeting HAC by July 31, 2020. The additional request to reopen a series of permits within 30 days of the rule amendment is beyond the scope of the federal court orders. In its July 16, 2019 Order, the federal district court directed the department to set forth a reasonable timeline that begins with the relaxed criteria for the Current Variance Standard and leads to compliance with Montana's based numeric nutrient standards; the department has done this. No changes have been made to Department Circular DEQ-12B in response to this comment.

**COMMENT NO. 32:** To comply with the letter and intent of Order 2, DEQ must make the following changes (text recommended to be deleted shown as strikethrough, new or acceptable additions as underline) to its proposed Circular DEQ-12B amendments. ~~Through the MPDES permitting process for each facility, t~~ The department shall immediately reopen MPDES permits and establish use a compliance plan to ensure any permittee not presently attaining HAC takes the time steps necessary to meeting the treatment requirements in Table 12B-1. ~~The time for the general variance must only be as long as necessary to meet the treatment requirements in Table 12B-1, but could take up to 17 years from the date of approval of the general variances in this circular. All facilities in the ≥1MGD and <1MGD discharge categories must meet the treatment requirements in Table 12B-1 as soon as possible, but in no case later than July 1, 2027.~~ January 1, 2023.

The department has identified up to five ~~nine~~ steps for facilities in the ≥1MGD and <1MGD discharge categories to achieve the Table 12B-1 treatment requirements.

~~the department estimates that most of these facilities will achieve the Table 12B-1 treatment requirements well before July 1, 2027. These five steps are shown in Table 12B-2. The steps outline both are a combination of advanced operational strategies using existing facility infrastructure and capital improvements; approximate times (in years) for each step are shown. If a facility were to achieve the Table 12B-1 treatment requirements using a subset of the steps in Table 12B-2, the department would expect the discharger to need less time to complete that subset of steps.~~ The purpose of Table 12B-2 is to provide an outline of potential steps needed to achieve the Table 12B-1 treatment requirements. The actual time period for individual steps may vary between each facility but in all cases variance recipients must attain HAC in their effluent streams by January 1, 2023. however, the total time necessary to meet the treatment requirements in Table 12B-1 may not exceed the remaining variance period. These steps do not necessarily need to be completed in the order shown.

**RESPONSE:** The department does not agree with the comment. MPDES permitting is a separate process and current permittees are at different stages in their individual permit cycles. Department engineers, who have expertise in both the engineering and financing aspects of the activities outlined in the table, concluded that it will take a facility until at least 2025 to complete the full set of activities. This is assuming funding application (and subsequent work) occurs right now. It is not possible for those facilities who need to secure funding from the Montana legislature to fund capital improvements necessary to achieve HAC, to go back in time to seek legislative approval from prior legislative sessions. The Montana legislature meets on odd years, the next session being 2021. See HAC Compliance Schedule Memo (Aug. 13, 2019). Due to the biennial timing of public funding cycles, 2027 is now a much more realistic completion point, which is why the department incorporated July 1, 2027 in the circular. The department has also concluded that not all facilities that still need to achieve HAC will need until 2027 to do so, which is why "as soon as possible" was included with the completion date of July 1, 2027. No changes have been made to Department Circular DEQ-12B in response to this comment. See *also* response to Comment No. 31.

**COMMENT NO. 33:** Revised Department Circular DEQ-12B should reflect the timelines that the court described: the 2023 deadline for HAC compliance articulated by Waterkeeper's remedy brief and expert analysis. We again urge DEQ to revise Department Circular 12B to mirror the timelines described in Waterkeeper's brief and expert report as required by the court.

**RESPONSE:** The department disagrees the federal district court described a 2023 deadline for HAC compliance. Revised Department Circular DEQ-12B complies with the court's orders. See *also* responses to Comments No. 31 and 32.

**COMMENT NO. 34:** In order to comply with Order 2, DEQ should use the language originally provided in Waterkeeper's remedies brief to develop appropriate rule requirements that ensure lagoons take concrete, near-term steps towards meeting respective HAC in a feasible, transparent, and accountable manner.

**RESPONSE:** The work referenced in the comment is already occurring. From 2017 onward, the department has had a program to review wastewater lagoon

performance (Section 2.2.1.2, Department Circular DEQ-12B). Through that work, the department evaluates effective operational methods and identifies those lagoons that require additional improvements. For each facility, within one year of completing the review of operational methods, the department begins requiring implementation of the improvements at those facilities as terms and conditions of their next permit renewal that do not require substantial investment or additional study. As part of this rulemaking, the department has moved up the completion of the wastewater lagoon reviews by two years, from 2022 to 2020. No changes have been made to Department Circular DEQ-12B in response to this comment.

COMMENT NO. 35: Section 2.1 of Department Circular DEQ-12B is not compliant with Orders 1 and 2 and must be revised to contemplate iteratively more stringent HACs leading to ultimate compliance with WQS nutrient criteria. In turn, other requirements of Amended 12-B should lay out a transparent path for permittees towards making smart investments that allow for successively more stringent nutrient pollutant control results at their facilities.

RESPONSE: The department does not agree with the comment. The federal district court did not vacate approval of the department's findings concerning widespread economic and social impacts and also did not vacate approval of the Current Variance Standard (or HAC). The iterative reevaluation (and potential update) of HAC every three years is a statutory requirement (75-5-313, MCA) and has been carried out on schedule by the department since the initial adoption of Department Circular DEQ-12B in 2014. Regarding transparency, the department has made this process as transparent as possible by adopting the numeric nutrient standards—which are the ultimate goal. Interim treatment requirements going forward cannot be identified today, as they depend on cost and technology changes of the future. Permittees know that the department evaluates HAC triennially and that HAC may become more stringent in the future. In totality, today's HAC, the triennial reevaluation process, the opportunity for involvement and public notice, and the base numeric nutrient standards provide permittees as much information as the department can reasonably put forward to allow them to make the smart investments.

COMMENT NO. 36: We urge DEQ to require permittees to develop and submit a PMP within 90 days of any EPA approval of amended Circular DEQ-12B. Edits to the circular are provided here (text recommended to be deleted shown as strikethrough, new additions as underline).

For either a general or an individual variance, a permittee shall submit a PMP to the department ~~once the permittee achieves the identified HAC treatment requirements~~ within 90 days of this rule's approval by EPA. The department, following review and approval of the PMP, shall reopen and incorporate the PMP into the permittee's next MPDES permit ~~as further set forth in Sections 2.2.1.1 and 2.2.1.2~~ within 90 days of receiving the PMP. ~~If a permittee achieves the HAC treatment requirement for only one nutrient parameter (i.e., either TN or TP), but not both, then the permittee shall develop and implement a PMP for the~~

achieved nutrient parameter (while continuing to work toward the HAC treatment requirement for the other nutrient parameter).

**RESPONSE:** The department does not agree with the comment. As currently found in Department Circular DEQ-12B, the text in Section 2.2.1 makes clear that PMPs are to be submitted and incorporated into a permit after HAC is achieved—consistent with federal regulations on the subject. The edits provided by the commenter confuse this straight-forward linear process, and could potentially require a PMP submittal even when a permittee has yet to achieve HAC. No changes have been made to Department Circular DEQ-12B in response to this comment. See *also* responses to Comments No. 31 and 32.

**COMMENT NO. 37:** We strongly encourage DEQ to revise Amended-12B to include a list of minimum activities for a PMP.

**RESPONSE:** Pollution minimization programs (PMPs) are highly case-specific and are best developed by the permittees, who are aware of the types of activities that are most likely to be successful for them. The department has provided a framework and guidance on the subject in the draft guidance document, including reference to the department's detailed compendium of optimization and best management practices for lagoons. No changes have been made to Department Circular DEQ-12B in response to this comment.

**COMMENT NO. 38:** We urge DEQ to use this rulemaking to provide clear direction to permittees encouraging possible beneficial reuse, reclamation, and potential seasonally optimized discharges (only discharging to surface waters during certain times of year). Potential activities could include water conservation; irrigation of public works and private properties; biosolids compositing; snowmaking; biomass production.

**RESPONSE:** The department has been encouraging permittees to consider the activities listed in the comment, and many others related to nutrient reduction, for many years, even well before the requirement to do so was codified at 75-5-313(11), MCA. The department will continue to do so in the future. Furthermore, the department may not unnecessarily repeat statutory language in rule. No changes have been made to Department Circular DEQ-12B or ARM 17.30.660 in response to this comment.

**COMMENT NO. 39:** MAR Notice 17-408 simply revises ARM 17.30.660 to incorporate by reference Department Circular 12B (November 2019 edition). Section 75-5-313, MCA, is a temporary water quality standard as defined under federal regulations, as are all department rulemaking elements constructed to implement this statute, including Department Circular 12B (November 2019 edition). Section 75-5-312, MCA, vests authority with the Board of Environmental Review (BER) to adopt temporary water quality standards. Rulemaking under MAR Notice No. 17-408 is occurring exclusively by the department and thus appears to suffer from a fundamentally flawed procedural process. The City of Bozeman requests DEQ address how this rulemaking process comports with all necessary requirements of state law since MAR Notice No. 17-408 cites its authority for rulemaking as 75-5-201 and 75-5-301, MCA.

**RESPONSE:** In most instances, the rulemaking authority for the adoption of standards for water quality is vested in the Board of Environmental Review. However, 75-5-313, MCA, provides the department with rulemaking authority to adopt nutrient standards variances. The department disagrees with the commenter that the rulemaking process must proceed through the Board of Environmental Review. The statutory authority for this rulemaking is 75-5-313, MCA, and was incorrectly listed as 75-5-201 and 75-5-301, MCA, in the notice of the proposed amendment. The department has made the necessary changes, incorporating 75-5-313, MCA, as the statutory authority for the rule.

**COMMENT NO. 40:** The statement of reasonable necessity for the rulemaking under MAR Notice No. 17-408 directly ties the proposed rulemaking to the July 17, 2019 Order. Given that the rulemaking is inextricably linked to the Order, we request clarification from the department as to how the appeal to the 9th Circuit will affect the legal effectiveness of the MAR Notice No. 17-408 rulemaking process.

**RESPONSE:** Provided the July 16, 2019 Order from the federal district court remains in effect, the department will proceed in compliance with the same. The effect of any appeal of the federal district court's decision upon this rulemaking is unknown at this time. See *a/so* response to Comment No. 46.

**COMMENT NO. 41:** The department contemplates revisions to the Implementation Guidance without expressly notifying interested parties of these changes within its notice. One reference is made in Department Circular 12B (November 2019 edition) to PMP guidance for mechanical plants (addition to first bullet of Section 2.2.1.1). This reference is made to [current] guidance developed by the department and the Nutrient Work Group. Revisions to the Implementation Guidance (November 2019) have not been developed through consultation with the nutrient workgroup and without notice. The department must consult with the nutrient workgroup prior to, or during, the MAR Notice No. 17-408 rulemaking process. To our knowledge, such consultation has not occurred.

**RESPONSE:** For purposes of the general nutrient standards variance, the department must consult with the nutrient workgroup to revisit and update concentration levels in Table 12B-1 of Department Circular DEQ-12B. However, any changes to these concentration levels are outside the scope of this rulemaking. Nevertheless, the department has discussed the department's guidance document (i.e., guidelines) with the workgroup on various occasions over the years. The exigency of this rulemaking precluded the department from completing updates to the guidance document (which pertained to the general variance) in time for the Nutrient Work Group meeting held August 6, 2019. The draft guidance document has been available on the department's website alongside the draft circular, draft rule, and other documents since the start of the public comment period on September 6, 2019. All interested parties were informed of the website. Please note that the guidance document is provided to help permittees with technical aspects of the variance and standards, and now includes reference to other department documents which detail a whole host of optimization and best management practices for wastewater lagoons. However, it is a guidance document

and is not binding. See *also* response to Comment No. 49.

COMMENT NO. 42: Section 2.0 of Department Circular 12B (November 2019 edition) requires the department to review, before July 1, 2020, the highest attainable condition (HAC) treatment requirements contained in Table 12B-1. How the review will be affected by the expected appeal to the 9th Circuit of the July 16, 2019 Order under Case No. CV-16-52-GF-BMM is an issue that needs further clarification.

RESPONSE: The foundational requirement to revisit and update the concentration levels contained within the general nutrient standards variance is found at 75-5-313(7), MCA, and the consideration of any update is outside the scope of the present rulemaking. The ultimate effect of any appeal of the federal district court's decision is unknown at this time; however, the department anticipates the scheduled review will occur as required. See *also* response to Comment No. 46.

COMMENT NO. 43: It is my understanding that the U.S. District Court for the District of Montana's Order in *Upper Missouri Waterkeeper v. U.S. EPA*, Case No. CV-16-52-GF-BMM (July 16, 2019) will be appealed. Please explain how the 12B and 12A changes will be handled pending the outcome of the appeals process (e.g., will the edits not be made final until the appeals process is complete?).

RESPONSE: Provided the July 16, 2019 Order from the federal district court remains in effect, the department will proceed in compliance with the same. Any changes to Circular DEQ-12A are outside of the scope of this rulemaking. See *also* response to Comment No. 46.

COMMENT NO. 44: Lack of Review by the Board of Environmental Review for a Temporary Water Quality Standard as required by 75-5-312, MCA. The rulemaking notice pertains exclusively to ARM 17.30.660. MAR Notice No. 17-408 lists statutory authority for this rulemaking as 75-5-201 and 75-5-301, MCA, to implement 75-5-313, MCA, Nutrient Standards Variances.

RESPONSE: See response to Comment No. 39.

COMMENT NO. 45: This timeline also does not mirror the Order entered July 16, 2019 under *Upper Missouri Waterkeeper v. EPA*, CV-16-52-GF-BMM. The Order timeline indicates 2023, which is less reasonable, but it still appears problematic that the two timelines differ.

RESPONSE: The department disagrees with the commenter that the federal district court's order requires a specific timeline of 2023. No changes have been made to Department Circular DEQ-12B in response to this comment. See *also* response to Comment No. 32.

COMMENT NO. 46: The current rules should acknowledge that should EPA or an intervenor prevail on appeal, the rule and any ancillary documents revert to the prior version adopted and approved prior to the July 2019 summary judgment order. In essence, given EPA's Rule 59 motion, and the likelihood of appeals in that matter, the current rulemaking effort may not be necessary at all.

RESPONSE: Provided the July 16, 2019 Order from the federal district court

remains in effect, the department will proceed in compliance with the same. However, in consideration of EPA's recently filed Motion to Alter or Amend Judgment, as well as the National Association of Clean Water Agencies' recently filed appeal of the federal district court's decision, the department agrees with the commenter and has added a contingency provision to ARM 17.30.660. Provided a court of competent jurisdiction upholds EPA's October 31, 2017 approval of the general nutrient standards variance, the contingency provision would void the November 2019 edition of revised Department Circular DEQ-12B and the previous version of the general nutrient standards variance, as set forth in the May 2018 edition of Department Circular DEQ-12B, would be applicable and effective.

**COMMENT NO. 47:** DEQ must revise its individual variance sections to also comply with Judge Morris' orders in terms of requiring HAC be a starting point for the variance period, and so too incorporate a transparent accountability framework that ensures measurable progress will be made by any individual variance discharger towards ultimately meeting base water quality standards.

**RESPONSE:** The department disagrees with the commenter. The individual variance sections of Department Circular DEQ-12B are outside the scope of this rulemaking. Furthermore, EPA's approval of the individual variance sections of Department Circular DEQ-12B were not the subject of the federal litigation in *Waterkeeper v. EPA et al.*, CV-16-52-GF-BMM (D. Mont). No changes have been made to Department Circular DEQ-12B in response to this comment.

**COMMENT NO. 48:** DEQ must revise Department Circular 12-B to include the following timelines for implementation of HAC at lagoons as part of enforceable NPDES permits (*i.e.*, immediately reopen MPDES permits for amendment post-rulemaking/EPA approval and use compliance plans to ensure timely progress). Again, years are from "Year Zero," which Waterkeeper considers January 1, 2018, a date which the Court found acceptable. See Order 2 at 6; Report at pp. 10-11.

For the lagoon discharge category, the department ~~and shall complete~~ [sic] reopen the MPDES permits for any permittee not presently attaining HAC and impose a compliance plan that includes, among other items, the pollutant minimization program requirements described in **Section 2.2** and **Section 2.2.1.2** as soon as possible but in no case later than July 1, 2027. These actions and activities must be completed on or before seven years have elapsed from Amended 12-B approval as laid out in the Table below.

**RESPONSE:** The department disagrees with the commenter. The table referenced by the commenter at the end of the comment suggests a series of activities and timeframes for lagoons to carry out various activities. The federal district court's order does not incorporate the deadlines or specific actions listed in the comment. No changes have been made to Department Circular DEQ-12B in response to this comment.

**COMMENT NO. 49:** Revised Department Circular 12-B references requirements and procedures outlined in a separate Guidance document several



times and appears to treat such requirements as binding in nature. If DEQ intends for such "guidance" to in fact reflect regulatory requirements that must be incorporated in MPDES permits, DEQ must rename its Guidance document as an Appendix or like document and attach it to revised Department Circular 12-B and in so doing properly make it binding through proper administrative procedures.

RESPONSE: The guidance referenced in the proposed revisions to Department Circular DEQ-12B are not binding regulatory requirements. However, permittees are encouraged to consider any current department guidance in developing Pollutant Minimization Programs (PMPs) for both mechanical and lagoon-based treatment systems. For purposes of clarity, and to avoid similar misinterpretations in the future, DEQ has amended the language "shall consider any current guidance" to "are advised to consider any current guidance" in the two locations the language appears in Section 2.2 of Department Circular DEQ-12B.

COMMENT NO. 50: Section 2.0 of Department Circular 12B (November 2019 edition) in its third paragraph states [For] permittees whose effluent concentrations were, before July 1, 2017, lower than the concentrations in Table 12B-1, the general variance must be based on the actual total N and/or total P concentrations of their effluent. This language is impractical and has the effect of depriving a POTW of capacity in which it has invested significant amounts of public monies and is relying on to repay bonds for improvements to a water reclamation facility. DEQ could also consider revising the performance cap language in this rulemaking to allow for a showing that a permittee's performance in excess of HAC is related to underutilized plant capacity, thereby allowing a pathway for permitting loads in excess of current performance.

RESPONSE: The comment discusses requirements which are outside the scope of this rulemaking. This rulemaking is only intended to address the specific concerns of the federal district court. No changes have been made to Department Circular DEQ-12B in response to this comment.

COMMENT NO. 51: There is still no justification offered for excluding private dischargers from the general variance. DEQ submitted its nutrient regulation variance program to EPA for approval pursuant to 40 C.F.R. § 131. EPA approved Montana's rule for 36 municipal dischargers but inexplicably excluded private dischargers. EPA did not attempt to justify its decision, leaving private dischargers without a key means of maintaining compliance with Montana's water quality standards for nutrients that are otherwise unrealistically stringent. The proposed rule amendment does nothing to remedy the artificial distinction in the variance regulations between public and private dischargers.

RESPONSE: The department agrees that EPA's October 31, 2017 approval of Montana's general nutrient standards variance did not extend to private dischargers. However, this rulemaking is only intended to address the specific concerns of the federal district court. No changes have been made to Department Circular DEQ-12B in response to this comment.

COMMENT NO. 52: The proposed rule amendment perpetuates EPA's arbitrary treatment of private dischargers. EPA's response to DEQ's submission of

the rule for individual variances stated, summarily, that the information submitted for private dischargers did not constitute a sufficient economic demonstration. The proposed rule amendment simply carries forward EPA's categorical and disparate treatment of private dischargers, essentially eliminating any benefit from individual variances without justification.

**RESPONSE:** The department disagrees that individual variances are not available for private dischargers. However, individual variances are outside the scope of this rulemaking. This rulemaking is only intended to address the specific concerns of the federal district court related to Montana general nutrient standards variance. No changes have been made to Department Circular DEQ-12B in response to this comment.

**COMMENT NO. 53:** The proposed rule amendment should apply equally to private dischargers. The proposed rule amendment merely codifies arbitrary treatment of private dischargers in Montana. No rational justification exists for this disparate treatment, and the proposed rule should be amended to apply equally to both, together with the information necessary to require EPA to address this issue head-on.

**RESPONSE:** The department agrees that EPA's October 31, 2017 approval of Montana's general nutrient standards variance did not extend to private dischargers and was limited to 36 municipal dischargers. Nonetheless, this rulemaking is only intended to address the specific concerns of the federal district court related to EPA's October 31, 2017 approval of the general nutrient standards variance. No changes have been made to Department Circular DEQ-12B in response to this comment.

**COMMENT NO. 54:** Under section 2.0 General Nutrient Standards Variances, on Page 2, third paragraph, it says that DEQ will use the 95th percentile of actual monthly average concentrations to determine if the effluent attains or does better than Table 12B values and, if better than 12B values, then actual concentrations will be end of pipe limits. If the 95th percentile estimate is valid, then it would seem that this approach would lead to noncompliance as about 5 percent of the effluent concentrations would exceed the actual concentration as defined by the 95th percentile. Commenters suggest that instead, DEQ compare maximum monthly concentrations to DEQ Department Circular 12B values.

**RESPONSE:** This rulemaking is only intended to address the specific concerns of the federal district court. The commenter's suggestion is outside the scope of this rulemaking. No changes have been made to Department Circular DEQ-12B in response to this comment.

**COMMENT NO. 55:** Guidance Document: request that the text listed "It should also be noted that some facilities do not qualify for the general variance for Clean Water Act purposes (see EPA Region 8 action letter 8WP-C, October 31, 2017)" be changed to "It is EPA's position that some facilities "are outside of the scope" of the general variance for Clean Water Act purposes.

**RESPONSE:** The department agrees with the comment and will reword as proposed by the commenter. The text was added to the Guidance Document to

reflect EPA's 2017 approval decision.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL  
QUALITY

/s/ Edward Hayes  
EDWARD HAYES  
Rule Reviewer

BY: /s/ Shaun McGrath  
SHAUN McGRATH, Director

Certified to the Secretary of State November 12, 2019.